- The § 272 affiliate have "separate officers, directors and employees" from those of Qwest Communications [§ 272(b)(3)]
- Transactions with Qwest Communications be conducted "on an arm's length basis with any such transactions reduced to writing and available for public inspection" [§ 272(b)(5)]
- Qwest Communications not discriminate in favor of its § 272 affiliate in any dealings between the two [§ 272(c)(2)]
- Qwest Communications accounts for all transactions with its § 272 affiliate in accord with the FCC accounting principles [271(c)(2)]

For ease of reference, the following Qwest entities will be discussed in this portion of the Report:

- Qwest Communications International (QCI): the parent company of the Qwest family of enterprises
- Qwest Corporation (QC): the BOC, which is the entity that provides local exchange service in the 14 state region one served by US WEST
- Qwest Services Corporation (QSC): a wholly owned subsidiary of QCI, the parent; QSC owns the long distance affiliate, which is Qwest Communications Corporation
- Qwest Communications Corporation (QCC): the currently designated § 272 affiliate; QCC is wholly owned by QSC and it is the pre-merger entity through which Qwest had previously provided interLATA services in many areas of the United States.
- Qwest Long Distance, Inc. (QLD): the entity that Qwest, and before it U S WEST, used for some time to provide interLATA service outside its 14 state region, and, until fairly recently the designated § 272 affiliate

The issues unresolved between the parties are discussed in the Facilitator's Report on Group 5 Issues beginning on page 47. The unresolved issues include:

- Separation of Ownership
- Prior Conduct
- Use of Generally Accepted Accounting Principles (GAAP)
- Relevance of the GAAP Materiality Principle
- Adequacy of Documentation or "Audit Trail"
- Sufficiency of Internal Controls
- Separate Chart of Accounts
- Separate Accounting Software
- Employee Transfers Back and Forth Between Qwest Corporation (QC) and the 272 Affiliate
- 100 Percent Usage by the 272 Affiliate of Many QC Employees
- Participation of 272 Affiliate Employees in a QC Award Program
- Lack of Comparison of Payroll Registers
- Lack of Separate Payroll Administration

- Officer Overlap
- Failure to Post Billing Detail
- Failure to Post on a Timely Basis Transactions with Qwest Communications Corporation (QCC)
- Failure to Provide Service Completion Dates for Some Services
- Failure to Provide Required Verification of the Accuracy of Publicly Posted Information
- Whether QCC will be Informed of Planned Network Outages Before Public Notice is Given
- Whether Qwest will continue to Participate in Public Standard-Setting Bodies
- Whether Qwest has Committed not to Discriminate in Establishing Interconnection or Interoperability Standards
- Whether Qwest has stated that it would not Discriminate in the Processing of PIC Orders
- Use of Qwest's Official Services Network to Provide InterLATA Services
- Concern Regarding Improper Flow of Confidential Information With Employee Transfers between the BOC and the 272 Affiliate
- Nondiscriminatory Access to Qwest's OSS.

3. Analysis of Evidence

a. Separation of Ownership

Qwest (Qwest Corporation (QC)) presented testimony that Qwest Communications Corporation (QCC), its designated Section 272 affiliate, is a wholly owned subsidiary of Qwest Services Corporation (QSC), which in turn is wholly owned by the parent, Qwest Communications International (QCI). Qwest also testified that QC and QCC own no stock in each other.

The facilitator determined that QCC, the QCI entity currently proposed to provide in-region interLATA service following anticipated § 271 approval, is, by virtue of the corporate structure and ownership under which it operates, separate from QC, which is the entity that provides local exchange service in the 7 participating states.

The NDPSC agrees with the facilitator's conclusion.

b. Prior Conduct

AT&T cited three instances that it contended demonstrate a history of Qwest's noncompliance with the § 272(a) requirement that in-region InterLATA services be provided through a separate affiliate:

- A September 27, 1999 FCC finding that "U S WEST's provision of non-local directory assistance service to its in-region subscribers constitutes the provision of in-region, InterLATA service," and that the "nation-wide component of U S WEST's non-local directory assistance service was unlawfully configured.
- A September 28, 1998 FCC conclusion that U S WEST, through its marketing arrangement with pre-merger Qwest, was "providing in-region, InterLATA service without authorization, in violation of section 271 of the Act."
- A February 16, 2001 FCC ruling that Qwest's "1-800-405-WEST" calling card service constituted the provision of in-region, InterLATA service in violation of section 271.

Qwest argued that each of these three cases resulted from a good faith difference of opinion of what the statutory term "provide" means in the context of in-region InterLATA service. Qwest also argued that reliance on past behavior as predictive of likely § 272 compliance should be confined to behavior related to § 272.

The facilitator concluded that the examples cited by AT&T are not predictive of future Qwest conduct that is relevant to the issue of meeting the separate subsidiary requirements of § 272(a). The facilitator determined that with respect to the instances cited by AT&T, it is self-evident that Qwest only failed to use a separate subsidiary in the mistaken belief that the services did not constitute in-region InterLATA service. The facilitator recommended that there is no reason to conclude that Qwest's prior incorrect interpretations of what constitutes in-region, interLATA service, have had or will have anything material to do with the parallel issue of creation and maintenance of a separate subsidiary to provide in-region, interLATA service.

The NDPSC agrees with the facilitator's conclusions.

c. Use of Generally Accepted Accounting Principles (GAAP)

AT&T contended that its examination of Qwest's books and records disclosed what AT&T considered to be many examples of a failure by QCC and by Qwest Long Distance, Inc. (QLD when it was the § 272 affiliate) to follow accrual accounting and to make timely transaction entries into its books and records. Qwest's brief appeared to acknowledge that there were isolated instances and insignificant failures to bill or accrue relevant expenses on a timely basis involving QLD. Qwest's argument focused on how it accounted for transactions from and after the date of its designation of an entity as a § 272 affiliate. Qwest summarized a number of detailed changes it made to assure proper controls in the area of § 272 compliance. Qwest said the FCC has found similar measures at other BOCs sufficient to meet what Qwest quoted as the applicable test, which is to demonstrate that the BOC "has implemented internal control mechanisms reasonably designed to prevent, as well as detect and correct, any noncompliance with § 272."[143]

The facilitator recommended the material issue is to determine the degree of confidence that can be placed in the ability to provide proper, complete, and timely recognition on the books and records for transactions between the Qwest entities. The facilitator determined that Qwest did undertake substantial efforts to bring its transactions, both past and current, into compliance with applicable accounting requirements and that the very magnitude of that effort gives reason to merit validation that the efforts undertaken have had current effect and are likely to continue to prove sufficient to meet applicable requirements. Nonetheless, the facilitator recommended that Qwest be required to arrange for independent (i.e., third party) testing, covering the period from April through August 2001 to determine: (a) whether there have been adequate actions to assure the accurate, complete, and timely recording in its books and records of all appropriate accounting and billing information associated with QC/QCC transactions, (b) whether the relationship between QC, as a vendor or supplier of goods and services and QCC has been managed in an arms length manner, including, but necessarily limited to a consideration of what would be expected under normal business standards for similar contracts with an unaffiliated third party, and (c) whether there are reasonable assurances that a continuation of the practices and procedures examined will continue to provide the level of accuracy, completeness, timeliness and arms length conduct found in examining the proceeding two questions. The facilitator recommended that positive answers to the three established questions, under the type of examination identified on pages 54 and 55 of the Facilitator's Report on Group 5 Issues, should be sufficient to reduce to an acceptable level the current uncertainty about whether entry into the in-region, interLATA market will be accompanied by the compliance of § 272(b)(2).

The NDPSC agrees with the facilitator's recommendation. At the NDPSC's October 29, 2001 hearing, Qwest testified that it has arranged for the recommended independent examination. On November 15, 2001, Qwest filed the report of the independent examination conducted by KPMG along with affidavits of Judith Brunsting and Marie Schwartz.

The NDPSC considered the KPMG Report and the Schwartz and Brunsting affidavits at an informal hearing held March 19-20, 2002. KPMG indicated that it examined transactions that occurred between QC and QCC during the period April through August 2001. KPMG determined that except for twelve instances identified in the report, QC complied in all material respects, with the requirements of Section 272(b)(2), (b)(5), and (c)(2) of the Act and associated FCC accounting rules. Qwest

---

[143] Memorandum Opinion and Order, *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a, Southwestern Bell Long Distance; Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd 18,354 at ¶398 (2000) ("*SBC Texas Order*").

stated that all but one of the twelve discrepancies were identified by Qwest's internal controls and were in the process of being corrected before completion of the examination. Qwest also stated that all but one of the discrepancies related to the transition during the merger between Qwest and U S WEST and the process of making QCC compliant with Section 272.

The requirement of Section 272(b)(5) that a 272 affiliate conduct all transactions with the BOC "on an arm's length basis," and the requirement of Section 272(c)(1) that a BOC may not discriminate in favor of its 272 affiliate, are designed to ensure that potential competitors do not receive *less favorable* prices or terms, or *less advantageous* services from the BOC than its separate affiliate receives.[144] The discrepancies cited in the KPMG Report involved a net detriment to the 272 affiliate of $2.604 million. The Schwartz and Brunsting affidavits detailed how several new internal controls or enhancements to existing controls were being implemented to provide reasonable assurance that intercompany transactions initiated by either QC or QCC were identified, reduced to writing, accurately processed and posted. The existence of these controls, with the exception of two controls to be implemented at a later date, was confirmed in subsequent testing conducted by KPMG and described in the affidavit of Philip J. Jacobsen. The Jacobsen Declaration concluded that the new controls and control enhancements implemented by Qwest appear to strengthen the overall control environment with respect to Section 272 compliance and should minimize the types of discrepancies presented in the KPMG Report.

AT&T argued that the KPMG examination was limited in scope and was qualified by the discrepancies. AT&T also contended a subsequent time period should have been tested to determine if the new or enhanced controls were effective. AT&T also argued that the reforms Qwest has instituted to correct deficiencies identified in the KPMG Report have not been tested to determine whether they will, in fact, prevent recurrences of those deficiencies, and that without additional testing, the NDPSC cannot place reliance on Qwest's promises of compliance with section 272(b)(2), (b)(5) and (c)(1). Finally, AT&T argued the examination failed to address the provision of special access services for compliance with Section 272(e) of the Act.

The KPMG Report reviewed the issues identified by the facilitator. The NDPSC finds that the KPMG examination was not intended to be an audit, nor was it required to be as comprehensive as the testing that will be required in the biennial audit after 271 approval. It is also not dispositive here that the examination report was "qualified." The purpose of the examination was to determine if QC and QCC's internal controls were sufficient to provide reasonable assurance of future compliance with Section 272.

Where discrepancies were identified, our concern is that control weaknesses are addressed to minimize the likelihood of reoccurrence of similar discrepancies in the

---

[144] Accounting Safeguards Under the Telecommunications Act of 1996, 11 FCC Rcd 17, 539 ¶¶ 172, 176 (1996).

future. The Jacobsen Declaration, which was provided in addition to the facilitator's recommendation, examined and confirmed that such controls were in place as stated by the QC and QCC representatives. AT&T's request for a review of QC's compliance with section 272(e) in the provision of special access was not within the scope of the facilitator's examination and indeed was not even an impasse issue at the multistate workshop. Although AT&T failed to exercise its opportunity to raise 272(e) compliance issues at the workshop, there will be other opportunities to assure compliance in the future through performance testing or the biennial audit process.

The NDPSC finds, based upon the results of the KPMG examination and the subsequent new and enhanced controls implemented by QC and QCC, that there have been adequate actions taken to assure the accurate, complete, and timely recording in their books and records of all appropriate accounting and billing information associated with QC/QCC transactions. Although discrepancies were identified involving the transition of QCC as the 272 affiliate, the self-identification of those deficiencies and the implementation of enhanced and additional controls provides reasonable assurance that the relationship between QC and QCC will be managed in an arm's length manner. While we do have some of the same concerns expressed by AT&T relating to the lack of additional testing by KPMG, we find that the implementation of new and enhanced controls, in conjunction with the existing controls, provides reasonable assurances that QC's and QCC's practices and procedures will provide the level of accuracy, completeness, timeliness and arm's length conduct necessary for compliance with Section 272. The internal controls implemented by QC and QCC are reasonably designed to prevent, as well as detect and correct, any noncompliance with Section 272 and Generally Accepted Accounting Principles.

d. Relevance of the GAAP Materiality Principle

Qwest cited the opinion of its outside auditor for QCI's consolidated operations as evidence that QCI follows GAAP in all material respects.

AT&T took issue with Qwest's use of such a materiality standard. AT&T argued that what was material to the BOC/272-affiliate relationship might well not be material in the consolidated QCI context. Moreover, AT&T said the General Standard Procedures for Biennial Audits required all errors or discrepancies to be reported.

The facilitator determined that what counts in addressing materiality is not QCI's entire universe, nor even QC's total universe, but the universe that consists of transactions between QC and QCC or QLD. AT&T is therefore correct to a substantial degree in its argument. AT&T's argument goes too far in dismissing materiality altogether, however. The issue is what should be considered material for determining pre-market entry compliance with § 272(b)(2). The facilitator recommended the concept of materiality should remain part of evaluating compliance with § 272(b)(2), but the universe to which the standard of materiality should be applied consists of the total transactions, in the time period in question, between QC and QCC or QLD.

The NDPSC agrees with the facilitator's recommendation. At the NDPSC's October 29, 2001 hearing, Qwest testified that the recommended independent examination noted earlier should apply the materiality standard.

At the informal hearing for review of the KPMG Report on March 19-20, 2002, KPMG confirmed that it applied the materiality standard recommended by the facilitator and adopted by the NDPSC. KPMG used both qualitative and quantitative measures of materiality. For the quantitative aspects of materiality, KPMG used a mathematical calculation based on the dollar value of transactions between QC and QCC and KPMG's professional judgment to establish the appropriate percentage level to represent a material transaction or discrepancy. The NDPSC finds that KPMG properly applied the appropriate materiality principle in its examination of QC's and QCC's compliance with the Section 272 requirements.

e. Adequacy of Documentation or "Audit Trail"

AT&T alleged that, as of January 20, 2000, QC stopped providing information that is material to meeting the disclosure requirements of § 272(b)(2). Specifically, AT&T alleged that Qwest dropped the transaction details from the list of posted information. AT&T further argued that the failure to post QCC transactions prior to April 2001 demonstrates lack of an audit trail.

The facilitator determined that the point of public posting of transaction information is to permit a non-affiliated entity to decide if it wishes to make use of the same services that are being provided to a Qwest affiliate. Thus, the public posting issue has nothing to do with the question here at issue, which is whether there exists somewhere the information necessary to allow validation that the services actually being provided to affiliates are in accord with the posted agreements, work orders, and task orders upon which non-affiliates must rely in deciding whether to take service from Qwest.

The facilitator recommended that the independent examination recommended earlier should test whether the posting of information is consistent not only with what the company says it provides for affiliates, but with what is actually provided.

The NDPSC agrees with the facilitator's recommendation. KPMG determined in its examination, that in each instance in which a QC/QCC transaction was reduced to writing, there was an appropriate and adequate posting of the transaction to the website. Accordingly, the posted agreements, work orders and task orders upon which non-affiliates must rely in taking service from Qwest, are sufficient for allowing the non-affiliate to determine whether it wishes to make use of services being provided to a Qwest affiliate. Although KPMG discovered discrepancies in which some QC/QCC services were not reduced to writing and therefore not posted to the website, existing internal controls which identified those transactions, as well as the additional and enhanced controls implemented by QC and QCC, should minimize any such occurrences in the future. The NDPSC determines that there is adequate documentation of an "audit trail" for Section 272 compliance and that Qwest is properly posting Section 271 transactions.

f. Sufficiency of Internal Controls

AT&T argued that its findings about the lack of timely accrual and billing for services demonstrated a lack of adequate controls at Qwest.

The facilitator determined that this aspect of AT&T's concerns would be adequately addressed by the recommended independent examination, which is intended to determine whether Qwest's actions have produced sufficient assurances of compliance with applicable requirements.

The NDPSC agrees with the facilitator's recommendation. The KPMG examination tested to provide assurances that Qwest's internal controls, which are intended to provide timely accrual and billing of services, were properly functioning. Eleven of the twelve discrepancies identified by KPMG had been detected by Qwest's internal controls. Qwest has further strengthened those controls as described in the Schwartz and Brunsting affidavits and as confirmed by the Jacobsen Declaration. The NDPSC finds that the KPMG examination, along with the Schwartz and Brunsting affidavits and Jacobsen Declaration, provide the needed additional assurances that Qwest has adequate internal controls in place to detect and correct any untimely accrual and billing for QC/QCC services.

g. Separate Charts of Accounts

AT&T noted that it took several efforts before it could finally secure charts of accounts for QC, QCC, and QLD. AT&T argued that the failure to provide evidence of such separateness demonstrates a lack of diligence with respect to compliance with this requirement.

The facilitator determined that the record demonstrates that Qwest does maintain separate charts of accounts.

The NDPSC agrees with the facilitator's conclusion.

h. Separate Accounting Software

AT&T said that it could find no evidence that QC and QLD were using separate accounting software.

The facilitator determined that AT&T provided no legal support for its contention that separate accounting software between the BOC and the 272 affiliate is required. This argument runs counter to the FCC's recognition that inter-affiliate services represent an opportunity for economies of scale that should not be denied a company such as Qwest. The facilitator determined the real issue is whether the accounting function is separately performed and subject to adequate controls. The facilitator determined that the evidence presented raises no substantial argument that Qwest fails to adequately separate the accounting of the BOC and the 272 affiliates.

The NDPSC agrees with the facilitator's conclusion.

i. Employee Transfers Back and Forth Between Qwest Corporation (QC) and the 272 Affiliate

Section 272(b)(3) says the 272 affiliate "shall have separate officers, directors, and employees from the Bell operating company of which it is an affiliate."

AT&T alleges that "a revolving door atmosphere" has produced movement back and forth between QC and the § 272-affiliate, which has "subverted" the purpose of this section of the Act.

Qwest argued that neither the Act nor the FCC precludes movement back and forth between QC and QCC. Qwest also stated that it has taken adequate steps to prohibit any inappropriate conduct that might result from such employment movement including:

- Requiring the return of 272-affiliate assets by an employee leaving the 272 affiliate
- Requiring employees leaving the 272 affiliate to account for documents in their possession
- Requiring employees leaving the 272 affiliate to acknowledge that they will no longer have access to that affiliate's information and that they may not disclose the affiliate's information
- Requiring such employees who take positions with another Qwest entity to sign a non-disclosure agreement that prevents the sharing of non-public information between the companies
- Instituting procedures training to ensure compliance with section 272
- Requiring employees to review annually the Code of Conduct that governs relationships among the QC affiliates
- Providing training for new employees
- Informing employees that violations may lead to disciplinary action that includes termination of employment
- Providing for physical separation of the offices of QC and QCC
- Providing color-coded badges to identify the 272 affiliate's employees.

The facilitator determined that Congress has not prohibited movement between affiliates; it requires instead independent operation and separate employees. The facilitator stated that the record supports a conclusion that Qwest maintains the required degree of employee separation, and that transfers to date, given the mitigation measures adopted by Qwest and not challenged as to sufficiency by any other party, do not rise to a level that suggest a compromise of operational independence.

The NDPSC agrees with the facilitator's conclusion.

j. 100 Percent Usage by the 272 Affiliate of Many QC Employees

Section 272(b)(3) says the 272 affiliate "shall have separate officers, directors, and employees from the Bell operating company of which it is an affiliate." AT&T argued that employment of "many" individuals by QC who have been assigned full-time to the work of the 272 affiliate subverts the purpose of §272(b)(3).

Qwest responded that the FCC does not prohibit service sharing and that QC and QCC have agreed to implement a new policy prohibiting employee assignments for periods of more than four months of out of any twelve.

The facilitator recognized that the FCC allows shared services between a BOC and its 272 affiliate. Thus, it should not be considered surprising or inappropriate to find a substantial percentage of a BOC employee's time being charged to the 272 affiliate over what looks to be a long period of time. The facilitator determined, however, that long-term assignment of all an employee's time to an affiliate could raise concerns in some cases. The facilitator determined that Qwest's commitment to limit full-time assignments to no more than four months of any twelve represents a good faith effort to simplify what can become a murky, very judgmental question to address. The facilitator recommended the proposal be acceptable for present purposes, recognizing that experience gained through ongoing monitoring efforts will be the better judge of how long-term separations of employment and assignment affect the fulfillment of §272 objectives.

The NDPSC agrees with the facilitator's recommendation finding acceptable, for present purposes, Qwest's commitment to limit full-time assignments to no more than four months of any twelve.

k. Award Program Participation

AT&T argued that a Qwest award program that allowed the participation of both QC and QCC personnel compromised the independent operation of the two entities.

The facilitator determined the FCC has already decided that at least the overall performance of the BOC can be considered in compensating 272 affiliate employees and vice versa. The FCC, however, should not be read as being indifferent to a compensation mechanism that specifically induces BOC or 272 affiliate employees to act in a manner that would promote inappropriate inducements for customers to change carriers. The facilitator determined the exhibit relied upon by AT&T presents no evidence of improper inducements. Except in the case of misuse of information, there is no compromising of independent operation through a common customer referral and cost saving reward system. The facilitator believed that the record did not disclose all of the facts about the operation of this reward system, but concluded that absent further evidence, the award program will not bear significantly on Qwest's compliance with the independent operations requirements of §272.

The NDPSC agrees with the facilitator's conclusion.

l. Lack of Comparison of Payroll Registers

Qwest testified that it performed a comparison of the payroll registers of QC and the 272 affiliate, and that this comparison showed no overlap. AT&T argued that the evidence demonstrated that before these proceedings, Qwest had never conducted a payroll register analysis for prior years.

The facilitator found that AT&T cited no requirement that there be routine, cyclical payroll register comparisons for some time period predating a 271 application. The facilitator determined there is not at present an overlap, that Qwest recognizes the obligation to preclude overlap; and that Qwest considers an examination of payroll registers to be an appropriate tool in assuring the restriction against simultaneous employment is being met. The facilitator concluded the requirement is being met and found no basis to conclude it has not been met historically, and that the biennial audits will suffice to assure the requirement continues to be met.

The NDPSC agrees with the facilitator's conclusion.

m. Lack of Separate Payroll Administration

AT&T argued that the performance of recruiting by QCC for QC and the lack of separate payroll administration between the two would undermine any conclusion that the companies maintain the operating independence required by § 272(b)(1).

The facilitator found that the FCC has rejected the notion that common services should be prohibited as a means of encouraging "independence" as AT&T would define it. To the contrary, the FCC has endorsed common services, other than the network related areas where they are specifically prohibited, as a means of capturing economies of sale. The facilitator found no need to go further than existing conduct limits to remove natural economies of scale that, in a competitive market, inure to the benefit of customers.

The NDPSC agrees with the facilitator's conclusion.

n. Officer Overlap

AT&T raised concern about an employee who, after the merger, moved from being a 272-affiliate officer to becoming a director of the BOC. Qwest presented evidence demonstrating this employee was never in violation of the applicable requirements against simultaneous service of the BOC and the 272-affiliate.

The facilitator determined that the record fully supports the conclusion that there was no simultaneous service by the officer. The facilitator concluded that AT&T's suggestion that this one cited incident somehow casts doubt on the independence of the 272 affiliate's employees, officers, and directors, is without a substantial factual basis, and is lacking a clear legal foundation.

The NDPSC agrees with the facilitator's conclusion.

o. Failure to Post Billing Detail

Section 272(b)(5) requires the 272-affiliate to cause its transactions with its affiliated BOC to be reduced to writing and available for public inspection. The FCC requires that the description of the asset or service and the terms and conditions of the transactions should be sufficiently detailed to allow the FCC to evaluate any compliance with its accounting rules.

AT&T objected to Qwest's decision, apparently effective as of January 1, 2000, to stop posting "billed amounts" under the transactions whose terms and conditions Qwest was making public. From that point, Qwest began to limit inspection of such information to on-site examinations by those who first executed protective agreements. AT&T said that posting the agreements, work orders, and task orders is insufficient, because non-affiliates need to see the transaction details in order to make an informed decision about whether to take the same services. AT&T would include in such required detail the actual service or items purchased and the amount actually paid for it. AT&T said that such detail was also required to verify that there is no discrimination against non-affiliates in providing the services or items at issue.

Qwest said that its posting of Master Services Agreement, along with work orders thereunder, served to provide adequate notice of the details of the services provided, the dates of service commencement and completion, and the prices charged, with additional detail available to those willing to execute a nondisclosure agreement.

The facilitator determined that the purpose for making transaction information available does not necessarily require the posting of the individual transaction detail that AT&T seeks. Further, the examination recommended previously will discuss the sufficiency of the master agreements, work orders, and reconciliation data to provide competitors with an adequate specification of terms and conditions to allow rational decisions about taking services. Public posting is also not necessary to accomplish the purpose of making transaction data available to assure that audits or other formal examinations of transactions can take place. There are, however, substantial reasons for not making such information publicly available. The facilitator recommended that Qwest's practice of requiring nondisclosure agreements and on-site examinations of such information constitute appropriate means for assuring that audit-related work can take place without allowing competitors to make competitive use of the information observed.

The NDPSC agrees with the facilitator's recommendation. KPMG's examination tested Qwest's Internet postings in light of the FCC rules regarding such postings. The NDPSC finds that although KPMG discovered some clerical errors, the details of the Internet postings were consistent with the underlying master agreements, work orders and supporting documentation.

p. Failure to Post on a Timely Basis Transactions with Qwest Communications Corporation (QCC)

AT&T argued that Qwest violated the transaction posting requirement by failing to post transactions before late March of 2001 because AT&T said that QCC became, by operation of law, a § 272 affiliate as of July 2000 when the U S WEST/Qwest merger became effective. AT&T also cited instances of late transaction postings and that the web site of the former 272 affiliate, QLD, was activated close to two years after the effective date of the *Accounting Safeguards Order*[145], which established transaction positing requirements.

Qwest responded that it is now providing timely transaction posting, that it should not be obliged to post transactions before an entity becomes a § 272 affiliate, that many of the cases cited by AT&T occurred during the unsettled period of the transition to QCC as the § 272 affiliate, and that AT&T's arguments are essentially a repeat of other arguments regarding accounting practices.

The facilitator concluded that QCC did not become a 272 affiliate by operation of law when it became affiliated with a BOC through merger in July 2000. Not all BOC affiliates are necessarily § 272-affiliates. Section 272 only says that manufacturing, in-region InterLATA telecommunications, and interLATA information services need to be provided through a separate affiliate. If no such services are being provided, then there is under the Act, no "272 affiliate." Thus, there is no inherent reason for concern about a decision to elect to provide what continues to be a future service offering through an affiliate different from the one earlier expected to carry out that role. The facilitator recommended that no more is required than the independent examination recommended previously relative to the effectiveness of recent Qwest changes in

[145] Report and Order, *Implementation of the Telecommunications Act of 1996; Accouting Safeguards Under the Telecommunications Act of 1996*, 11 FCC Rcd 17,539 (1996)("*Accounting Safeguards Order*")

systems, practices, and controls in giving assurances that it is committed and prepared to comply with § 272 requirements on a predictive basis.

The NDPSC agrees with the facilitator's recommendation. KPMG's examination revealed discrepancies in which QC/QCC services were not identified in a timely manner and therefore not reduced to writing and accordingly not posted to the Internet. As discussed previously, Qwest has implemented new and enhanced controls to minimize the likelihood of such occurrences in the future. In any regard, in each instance in which a QC/QCC service was identified and reduced to writing, the transaction was posted to the Internet as required by the FCC's rules. The NDPSC finds that the KPMG examination provides reasonable assurances that Qwest is committed and prepared to comply with the section 272 posting requirements on a predictive basis.

q. Failure to Provide Service Completion Dates for Some Services

AT&T argued that the FCC requires that transaction postings provide either the length of time or estimated completion date of any project. AT&T said that it found agreements between QC and QCC that have "indefinite" completion dates.

The facilitator concluded that it is self-evident that commercial contracts often provide for indefinite terms subject to the right of either party to terminate them by providing notice. There is no reason to believe the FCC did or should have intended to restrict the ability of BOCs and their 272 affiliates to enter into such contracts.

The NDPSC agrees with the facilitator's conclusion.

r. Failure to Provide Required Verification of the Accuracy of Publicly Posted Information

The *Accounting Safeguards Order* requires that transaction information available for public inspection be accompanied by a certification that an officer of the BOC has examined the submission and that to the best of the officer's knowledge all statements of fact contained in the submission are true and the submission is an accurate statement of the affairs of the BOC for the relevant period. AT&T presented evidence that it found no statements during its examinations in 1998 and 1999.

Qwest admitted that it filed none, because it construed the certification requirement as applying only after filing of a § 272 application. AT&T later discovered certifications for QC and QCC filed by the same officer. The signer was listed as an officer of QCC but not of QC. AT&T argued that the failure of a QC officer signing the QC certification constituted a violation of the *Accounting Safeguards Order*.

The facilitator determined that whatever requirements may have applied in past periods when QC did not file certifications, QC recognizes the obligation to make such certifications and there is no basis for a predictive conclusion that QC is not likely to comply with applicable certification requirements. With regard to the certification signed by an officer of QCC but not an officer of QC, the facilitator recommended that the effectiveness of recent actions taken by Qwest during the transition in which QCC became the 272 affiliate will be examined under the preceding recommendation of the Report. The facilitator recommended the independent examination should confirm that QCC continues to have adequate controls in place to assure that a QC officer who has requisite knowledge provides the required certifications. Beyond this confirmation, the issue raises no other predictive concerns about Qwest's compliance with the requirements of § 272.

The NDPSC agrees with the facilitator's recommendation. KPMG examined Qwest's officer certification program and noted no discrepancies on this issue. The NDPSC finds that the KPMG examination provides reasonable assurance that Qwest has adequate controls in place to assure that a QC officer with the requisite knowledge provides the required § 272 certification.

s. Non-Discrimination

AT&T asserted that Qwest has not addressed the following items that the FCC considers in examining compliance with the nondiscrimination requirement:

- Whether QCC will be Informed of Planned Network Outages Before Public Notice is Given
- Whether Qwest will continue to Participate in Public Standard-Setting Bodies
- Whether Qwest has Committed not to Discriminate in Establishing Interconnection or Interoperability Standards
- Whether Qwest has stated that it would not Discriminate in the Processing of PIC Orders
- Use of Qwest's Official Services Network to Provide InterLATA Services
- Concern Regarding Improper Flow of Confidential Information With Employee Transfers between the BOC and the 272 Affiliate
- Nondiscriminatory Access to Qwest's OSS

Much of AT&T's argument that Qwest has not complied with this requirement is the failure to make timely payments.

Section 272(c)(1) provides that a BOC, when dealing with its § 272 affiliate:

> *May not discriminate between that company or affiliate or any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards.*

The facilitator determined that AT&T's list of items ignores that the general issue of discrimination was addressed in depth in the proceeding workshops, at which many items on AT&T's list were the subject of testimony. The facilitator recommended that the evidence shows that the kinds of issues AT&T says the FCC considers have been addressed, and that all participants have had an ample opportunity to present any evidence that bears upon the FCC's consideration of them.

At the NDPSC's October 29, 2001 hearing, Qwest testified that the recommended independent examination will determine "whether the relationship between QC as a vendor or supplier of goods and services and QCC has been managed in an arm's length manner..." The KPMG examination noted instances of violation of the FCC rules regarding and the payment of interest in QC/QCC transactions. In particular, with regard to the pricing rules, the Report indicated instances in which property was transferred or leased at fully distributed costs rather than fair market value. These errors involved instances in which QC was the vendor as well as instances in which QCC was the vendor. Qwest has undertaken new and enhanced internal controls to minimize the likelihood of such occurrences in the future. The NDPSC finds that the KPMG examination along with the additional controls provide reasonable assurance that the relationship between QC, as a vendor or supplier or goods, and QCC will be managed in an arm's length manner.

t. Compliance With FCC Accounting Principles

AT&T noted that its prior examples relating to noncompliance with GAAP and lack of internal controls demonstrate a failure to comply with the § 272(c)(2) requirement that a BOC, in dealing with its 272 affiliate:

> *account for all transactions . . . in accordance with accounting principles designated or approved by the Commission.*

The facilitator concluded that this issue has already been dealt with in the discussion of *Books and Records* relating to compliance with GAAP, and therefore the subject of the recommended independent examination noted earlier. The application of the § 272(c)(2) standard does not add materially to the considerations already made there with regard to compliance with GAAP.

The NDPSC finds that with the implementation of new and enhanced controls, there is reasonable assurance in Qwest's ability to comply with GAAP in providing proper, complete and timely recognition on its books and records for transactions between these entities. Accordingly, there is reasonable assurance of Qwest's ability to comply with the FCC accounting rules governing these transactions.

4. Conclusion

Reasonable assurance exists that the structural and nonstructural safeguards implemented by Qwest will meet the purposes of section 272 in preventing improper cost allocation and cross-subsidization between Qwest and its section 272 affiliate and assuring that Qwest does not discriminate in favor of its affiliate. Qwest should be deemed to be in compliance with the Telecommunications Act Section 272 requirements for structural and nonstructural safeguards.

D. ROC OSS Test

The Regional Oversight Committee ("ROC") Operations Support Systems ("OSS") test process, which began approximately 3 years ago, evaluated the five primary components of Qwest's OSS (pre-ordering, ordering, provisioning, maintenance and repair, and billing).

In order for the OSS tests to be meaningful, the ROC concluded that it was critical to conduct an audit to evaluate and analyze the ROC Performance Indicator Definitions ("PIDs") to ensure that they "accurately and reliably report actual Qwest performance." The ROC retained Liberty Consulting Group ("LCG") to conduct a Performance Measure Audit. LCG issued an initial draft report of its audit on July 11, 2001. The audit focused on three primary elements: (i) examining the business processes related to the performance measures, (ii) tracking data through the process to performance results reporting, and (iii) independently calculating performance results.

On September 25, 2001, LCG issued its final audit report, covering all PIDs and conclusively finding that the audited performance measures accurately and reliably reported Qwest's actual performance. The LCG report concluded that Qwest's performance reports "accurately and reliably report actual Qwest performance" under the PIDs adopted by the ROC.

AT&T characterizes the LCG audit of performance measures as a limited audit of primarily the processes that Qwest uses to track and report its performance, and although the audit sampled the data underlying the reported results, the audit did not perform a complete review of the input data that forms the basis for the reported results. AT&T believes that the functionality test portion of the ROC OSS test would be a better test of the accuracy of the input data underlying Qwest's reported performance because it the test would include a wide range of products and services in all of the thirteen states

KPMG Consulting ("KPMG"), hired by the ROC for the OSS test as the ROC OSS test administrator, and Hewlett-Packard ("HP") hired as the test's pseudo-CLEC, together executed a total of 28 tests, consisting of 685 applicable test points. In addition, there were 26 test points that were considered "diagnostic," and thus did not have defined success test criteria. Test results generally were assessed using Performance Indicator Definitions ("PIDs") collaboratively developed by Qwest, state regulatory authorities, numerous CLECs and other parties. On May 28, 2002 KPMG Consulting (KPMG) issued its Final Report on the Regional Oversight Committee's

("ROC's") test of Qwest's Operations Support Systems ("OSS test"). The Final Report includes two Pre-Order/Order Integration Field Comparison Reports issued by HP.

Of the 685 test points, 11 were found by the tester to fail to meet the quantitative, qualitative, parity, or existence parameter established for purposes of the test ("not satisfied") and for 26 criterion, the tester's evaluation and analysis was not able to fully determine ("unable to determine") that the criterion was satisfied or not satisfied.

Evaluation Criteria – Not Satisfied	
12-9-4	Qwest systems or representatives provide timely Jeopardy notices for Resale products and services.
12-9-5	Qwest systems or representatives provide timely Jeopardy notices for UNE-P.
14-1-10	Qwest provisions Unbundled Dark Fiber by adhering to documented method and procedure tasks.
14-1-14	Qwest provisions EEL circuits by adhering to documented method and procedure tasks.
14-1-34	Qwest meets the performance benchmark for PID OP-4C – Installation Interval for Business POTS.
14-1-36	Qwest meets the performance benchmark for PID OP-4C – Installation Interval for UNE-P services.
16-3-5	Modify a trouble report transactions are processed within the guidelines established by the ROC TAG benchmark.
18-6-1	Close out codes for out-of-service and service-affecting wholesale UNE-P, resale, and Centrex 21 troubles indicated in Qwest's systems, and that may or may not require the dispatch of a technician, are consistent with the troubles placed on the line.
18-7-1	Out-of-service and service-affecting wholesale UNE-P, resale, and Centrex 21 troubles that may or may not require the dispatch of a technician are successfully repaired.
24.6-1-8	A functional test environment is made available to customers for all supported interfaces.
24.6-2-9	Carrier-to-carrier test environments are available and segregated from Qwest production and development environments.

Evaluation Criteria – Unable to Determine	
12-9-1	Qwest provides Jeopardy Notices in advance of the due date for Resale products and services.
12-9-2	Qwest provides Jeopardy Notices in advance of the due date for UNE-P products.
12-11-4	Qwest-produced measures of Preorder/Order performance results for HPC transactions are consistent with KPMG Consulting-produced HPC measures.

12.8-2	Procedures for processing electronically submitted non-flow through orders are defined, documented, and followed.
14-1-37	Qwest meets the parity performance requirements for PID OP-6A - Delayed Days Business POTS.
14-1-38	Qwest meets the parity performance requirements for PID OP-6A - Delayed Days Residential POTS.
14-1-39	Qwest meets the parity performance requirements for PID OP-6A - Delayed Days UNE-P POTS.
14-1-43	Qwest meets the performance benchmark for PID OP-15 – Interval for Pending Orders Delayed Past Due Date – all Products.
14-1-44	Qwest-produced measures of ordering and provisioning (OP) performance results for HPC transactions are consistent with KPMG Consulting-produced HPC measures.
18-6-3	Close out codes for out-of-service and service-affecting wholesale DS1 and higher bit rate troubles indicated in Qwest's systems are consistent with the troubles placed on the line that may or may not require the dispatch of a technician.
19.6-1-17	DUF is corrected and returned according to a defined schedule.
19.6-1-19	CLECs can readily obtain status on DUF return requests.
20.7-1-3	Cycle balancing procedures exist to identify and resolve out-of-balance conditions.
20.7-1-4	Process includes reasonability checks to identify errors not susceptible to pre-determined balancing procedures.
20.7-1-5	Process includes procedures to ensure that payments and adjustments are applied.
20.7-1-9	Process includes procedures to ensure that bill retention requirements are operationally satisfied.
22-1-10	Defined processes for NDR implementations are adhered to.
23-1-7	Procedures and systems are in place to track information such as descriptions of proposed changes, key notification dates, and change status.
23-1-8	Criteria are defined for the prioritization system and for severity coding.
23-1-9	Qwest complies with notification intervals and documentation release requirements
23-2-2	The change management process is in place and documented.
23-2-7	Procedures and systems are in place to track information such as descriptions of proposed changes, key notification dates, and change status.
23-2-8	Criteria are defined for the prioritization system and for severity coding.
23-2-9	Qwest complies with notification intervals and documentation release requirements.
24.3-9	Customer calls are returned per documented/stated intervals.
24.10-3-4	Training of representatives is defined documented, and followed.

The OSS test employed a military-style "test until you pass" philosophy, which provided for multiple retests as necessary to ensure that Qwest met each of the applicable test points. As the test vendor tested a Qwest system, document or process, Qwest's performance was evaluated against the applicable test point. The test vendor informed Qwest of a problem encountered by issuing a written Observation or Exception concerning the problem. Qwest would then respond to the Observation or Exception in writing, clarifying the issue or describing an intended fix. After the appropriate fix was in place, the vendor would retest as required. If the fix satisfied the test, the Observation or Exception was closed. If not, it remained open and the process was repeated until the problem was resolved or Qwest requested that the Observation or Exception be designated "closed/unresolved." A total of 242 Observations and 256 Exceptions were issued in the course of the test. Nine Exceptions were closed/unresolved, one Observation was closed/unresolved, and five Exceptions were closed/inconclusive:

Observation/Exception Number	Date Closed	Status	Description of Issue
Observation 3110	5/28/02	Closed Unresolved	During the course of retesting PID OP-4C, KPMG identified 4 LSRs that were incorrectly handled and attributed to human error. KPMG indicated that the only means to close this observation would be to retest the process fixes for these manual errors.
Exception 3061	3/4/02	Closed Unresolved	Qwest provisioned Firm Order Confirmations (FOCs) for Resale PBX orders in a timeframe that was not in compliance with PID PO-5B. The Qwest Service Performance Indicator Definition (PID) PO-5B established the benchmark for the receipt of FOCs on Non-Flow-Through Resale PBX orders. The benchmark for this PID indicates that, for at least 90% of these orders, Qwest is to provide FOCs within 48 hours of order submission, whenever the orders are for 24 trunks or less. The P-CLEC submitted 39 Non-Flow-Through Resale PBX orders. For 28 of those orders (72%), Qwest provided FOCs within 48 hours of order submission. For the remaining 11 (28%), Qwest provided FOCs in a time period greater than 48 hours after the orders had been submitted.
Exception 3086	4/22/02	Closed Unresolved	Qwest did not install non-dispatch orders for the P-CLEC within a time period that is in parity with Qwest's retail operations, as measured by the PID OP-4C. Qwest failed the first dual test for residential POTS and UNE-P in all three regions and failed for Business POTS in the Eastern and Western region. The P-CLEC performed a retest on the products/regions that failed using January 2002 retail data. This retest concluded Qwest continued to fail for Resale Business in the Eastern region and UNE-P for all regions. Additionally in March 2002, Qwest identified a calculation error that affected reporting for wholesale and retail orders with a Saturday or Sunday application date. Reporting for OP-4 was including one additional business day in the interval calculation. Qwest recast the data to reflect this, as appropriate, and provided the recast data to the P-CLEC on 4/01/02. KPMG then recalculated the dual test analysis and determined that UNE-P failed in all three regions in addition to Eastern Region Business POTS.
Exception 3107	2/26/02	Closed Unresolved	Qwest did not process Non-Design Edit transactions that were submitted to the Customer Electronic Maintenance & Repair (CEMR) system in the timeframe defined by the benchmark for the Volume Peak test. Out of 36 Non Design Edit transactions processed, KPMG computed an average response time of

			0:00:27 and concluded that the difference of three seconds between the benchmark and Qwest's performance is statistically significant.
Exception 3055	2/7/02	Closed Unresolved	Qwest Trouble History contained inaccurate close-out codes for POTS Resale and UNE-P. KPMG Consulting conducted additional testing to retest the accuracy of close out codes. Retesting and subsequent discussions indicated that 108 out of 122 "dispatch in" and "dispatch out" accounts were closed out properly for a success rate of 88.5%.
Exception 3058	1/3/02	Closed Unresolved	Qwest did not successfully repair all of the Plain Old Telephone Service (POTS) Resale, UNE-P, and UNE-L circuits submitted for repair. KPMG placed faults and requested that Qwest repair the troubles through the normal wholesale repair process. Once the faults were repaired, KPMG revisited the locations where the faults were inserted to verify that the fault placed was repaired. Of 259 faults placed, 239 (92.28%) were correctly repaired.
Exception 3094	5/21/02	Closed Unresolved	Qwest did not adhere to its established change management process for notifying CLECs about a proposed change, and allowing input from all interested parties. KPMG Consulting identified the following issues: • Qwest did not provide adequate information to CLECs about a significant CLEC-impacting process change; • Qwest allowed only four (4) business days for CLECs to prepare for the proposed change; • Qwest did not respond to input from all interested parties; a number of CLECs objected to Qwest's implementation of this change and requested its immediate suspension. • Qwest did not update CR status on a timely basis; • Qwest CR includes rate changes that are not explicitly defined to be within the scope of CMP.
Exception 3077	4/15/02	Closed Unresolved	Qwest's Interconnect Mediated Access (IMA) Electronic Data Interchange (EDI) Stand Alone Test Environment (SATE) does not offer CLECs sufficient testing capabilities. KPMG's comments: • SATE does not offer true end-to-end testing capabilities through to Qwest's provisioning and billing systems. • Flow-through orders are not supported in SATE, even though these types of orders will be processed in the production environment. • The volume of order responses supported in SATE is restricted due to manual response handling. The data contained within the order responses is not consistent, and may not mirror the data that would be found in production responses.
Exception 3095	4/11/02	Closed Unresolved	Qwest's Interconnect Mediated Access (IMA) Electronic Data Interchange (EDI) Stand Alone Test Environment (SATE) does not offer CLECs testing capabilities for all Qwest products offered in production. KPMG indicated that although SATE currently supports all products that CLECs are

			currently running in production, it does not support all products that a CLEC *could* run in production.
Exception 3109	3/19/02	Closed Unresolved	Qwest's Mediated Access Electronic Bonding and Trouble Administration (MEDIACC-EBTA) End-to-End testing lacks a complete testing environment. During End-to-End MEDIACC-EBTA testing, test scenarios for non-designed services, are processed by the LMOS production mainframe. KPMG determined that, although CLECs were able to test all of the agreed upon scenarios, they found the process of testing non-designed services cumbersome, due to the necessary manual intervention of the Qwest Tester.
Exception 3010	2/20/02	Closed Inconclusive	Qwest is not adhering to the Dark Fiber M&Ps.
Exception 3104	2/26/02	Closed Inconclusive	Qwest is not adhering to its EELs M&Ps. KPMG observed 11 EEL orders. Adherence to the M&Ps was calculated at 87% (KPMG applies a 95% benchmark). On Jan 15, 2002, KPMG began retesting and observed 2 EEL orders.
Exception 3053	1/03/02	Closed Inconclusive	KPMG found that Qwest's OSSLOG Trouble History was missing the closeout codes for repairs completed to DS1 Services. Qwest responded that Disposition and Cause codes are used to close out repair trouble reports for POTS circuits and are not used for Design Circuits. Qwest then provided documentation indicating that Trouble and Analysis Codes are used for Design Circuits.
Exception 3110	5/21/02	Closed Inconclusive	Qwest did not adhere to its Change Management Process document management standards and tracking of CLEC notifications through the Mailout Notification System. KPMG Consulting reviewed a total of 115 CLEC notifications that Qwest distributed through the Mailout Notification System in December 2001, and identified six issues.
Exception 3111	4/04/02	Closed Inconclusive	Qwest Systems Change Management Process (CMP) lacks guidelines for prioritizing and implementing CLEC-initiated systems Change Requests (CRs); criteria are not defined for developing the scope of an OSS Interface Release Package KPMG Consulting identified that Qwest lacked documented guidelines for the CR Prioritization Process of major software releases, specifically: documents lacked information on the roles and responsibilities of Qwest staff involved in the analysis of CLEC-initiated systems CRs; documents lacked information on how Qwest allocated available resources for all systems CRs to be included in an OSS release; detailed analyses from Qwest software development team were not performed for all CLEC-initiated CRs; documents lacked definitions and criteria for the Level of Effort assignment for individual CRs; and documents lacked information on how Qwest identified CR packaging options for a software release that it recommended to CLECs, following the CR Prioritization Process. Through its review of releases 10.0 and 11.0, KPMG has reviewed Qwest's adherence with each phase of the prioritization and packaging processes for major system releases, that were in place and agreed to via CMP at the time of executing the process.

The final report indicates that a number of issues remained unresolved at the conclusion of the test. We recognize that the FCC has not required perfection in other Section 271 OSS proceedings. The NDPSC expects that Qwest will continue its efforts to address these issues. Should the FCC approve Qwest's application for interLATA authority, the NDPSC will continue monitoring and observing Qwest's actual wholesale service performance in accordance with the QPAP and the ongoing administration provided in the North Dakota QPAP. The NDPSC finds that the final report demonstrates that Qwest will provide CLECs with non-discriminatory access to OSS. In conjunction with the North Dakota QPAP and its ongoing administration, it is likely that Qwest will serve CLECs in a manner consistent with the requirements of Section 271.